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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VICTORIA MURRAY,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA,

Defendant and Respondent.

G040946

(Super. Ct. No. 07CC07102)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila
Fell, Judge. Reversed.

Agnew & Brusavich, Bruce M. Brusavich; and Jean Ballantine for Plaintiff
and Appellant.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Keri L. Bush, and
Madonna L. Devling for Defendant and Respondent.

Plaintiff Victoria Murray appeals from the judgment entered after the trial court granted the summary judgment motion of defendant The Regents of the University of California on plaintiff's complaint for premises liability. She contends the court erred because, among other things, her complaint adequately raised the issue of a design defect in the flooring of the room where she slipped and fell. We agree and reverse.

FACTS AND PROCEDURAL BACKGROUND

One afternoon, an employee of defendant escorted plaintiff into the recovery room at the University of California Irvine Medical Center to visit a friend. Plaintiff slipped on a clear liquid on the floor.

Plaintiff sued defendant for premises liability, alleging that "[a]s [she] was walking in or around [the] building . . . , she stepped on a wet foreign substance, which constituted a dangerous condition on the hard floor[and that a]s a direct result of the dangerous condition of defendant['s] premises, [she] slipped and fell, thereby sustaining serious personal injuries" She also alleged she "was walking on the premises in a safe and prudent manner when she stepped on a foreign substance on the floor. This substance was a wet and dangerous condition on the floor of defendant['s] premises. As a result of stepping into this dangerous condition, she slipped and fell on the hard floor of defendant['s] premises . . . [and] sustained serious personal injuries" The next paragraph states defendant "negligently, carelessly and unlawfully designed, constructed, owned, maintained, managed, inspected, serviced and repaired, and tended to the premises . . . , in particular the hard floor, so as to allow a dangerous condition of the premises to remain, which caused [plaintiff] to slip and fall, thereby resulting in severe personal injuries"

Defendant moved for summary judgment arguing the liquid on the ground did not constitute a dangerous condition under Government Code section 835 (all further

statutory references are to this code unless otherwise indicated) and plaintiff could not prove defendant had actual or constructive notice of the alleged dangerous condition. In opposition, plaintiff asserted the dangerous condition was not only the liquid on the floor but also the flooring itself because it became slippery when wet and did not meet applicable standards and codes. According to her, defendant's design was defective in that the flooring material combined with the lighting, "layout of trash receptacles, sinks, bathrooms, and the very patient services offered [by defendant] ma[d]e it highly foreseeable that the flooring will become wet]" and "clear liquids difficult to see." Plaintiff's evidence included an expert declaration by Brad Avrit, a civil engineer.

Defendant replied that the design defect and defective flooring issues were not alleged in the operative complaint but rather were first raised in opposition to the summary judgment motion and that in any event it was immune from liability under section 830.6. It also filed objections to plaintiff's evidence.

The court sustained defendant's objections to deposition testimony regarding the source of the liquid and to Avrit's declaration and granted the motion stating, "Plaintiff's theory that the floor or flooring at [d]efendant's facility was defective or defectively designed was raised for the first time in response to [defendant's summary judgment] motion. This issue was raised in the [c]omplaint . . . with a one[-]word reference to 'designed'. The limited and statutory nature of governmental liability mandates that claims against public entities be specifically pleaded. Plaintiff's one-word allegation in the [c]omplaint is insufficient. [¶] Defendant has established that there was no actual or constructive notice of liquid on the floor prior to [p]laintiff's accident. The testimony of multiple employees who traversed the area testified that no liquid was present. Plaintiff has no firsthand knowledge of a leak and cannot identify the person who asserts she made the remark. Defendant has properly objected to this claim on the basis that it is hearsay. [¶] Defendant has met its burden to establish that it was not negligent and that it had no actual or constructive notice of a dangerous condition prior to

[p]laintiff's fall The burden then shifted to [p]laintiff, who has not met her burden of proof because she has not submitted sufficient admissible evidence to rebut [d]efendant's material facts."

DISCUSSION

1. Standard of Review

We review de novo the granting of defendant's summary judgment motion, "“considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained[,]” . . . liberally constru[ing it] in support of the party opposing summary judgment and resolv[ing] doubts concerning the evidence in favor of that party. [Citation.]’ [Citation.]” (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.) “In undertaking our independent review of the evidence submitted, we apply “the same three-step process required of the trial court: First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in the movant's favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citations.]” [Citation.]” (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 392.)

2. Dangerous Condition of Property

“Under the Government Tort Liability Act, all liability is statutory. Hence, the rule that statutory causes of action must be specifically pleaded applies, and every element of the statutory basis for liability must be alleged.” [Citations.]” (*Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1020.) “A governmental entity is

liable for an injury caused by its property if at the time of the injury: (1) the property was in a dangerous condition; (2) the injury was proximately caused by the dangerous condition; (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred; and (4) the dangerous condition was negligently or wrongfully created by an employee of the entity, or the entity had actual and/or constructive knowledge of the dangerous condition a sufficient time ahead of the injury so as to take measures to protect against the dangerous condition. [Citation.] [¶] For the property to be considered in a ‘dangerous condition, it must create ‘a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used.’ [Citation.]” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1251 (*Laabs*).)

The trial court in this case determined, among other things, that the one-word reference “design” was insufficient to raise the issue of a design defect in the flooring because claims made against public entities must be specifically pleaded. Plaintiff argues this was error, relying on an allegation in her complaint, which states defendant “negligently, carelessly and unlawfully designed, constructed, owned, maintained, managed, inspected, serviced and repaired, and tended to the premises . . . , in particular the hard floor, so as to allow a dangerous condition of the premises to remain, which caused [her] to slip and fall”

“[F]actual issues presented in opposition to a motion for summary judgment should be considered if the controlling pleading, construed broadly, encompasses them. In making this determination, courts look to whether the new factual issues present different theories of recovery or rest on a fundamentally different factual basis.” (*Laabs, supra*, 163 Cal.App.4th at p. 1257.) Applying this principle here, we agree that the allegation, broadly construed, encompasses the theory that the premises including the particular floor was defectively designed. Although defendant is correct the

supporting facts cited in plaintiff's opposition were new, i.e., "insufficient coefficient of friction, improper lighting, the color of the flooring, together with the location of the trash receptacles in the recovery room," the design defect issue itself was not, having been sufficiently alleged in the complaint. The new facts did not create "new factual issues" (*ibid.*), nor did they result in "a complete shift in the allegations, . . . involving an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim [or complaint]." (*Blair v. Superior Court* (1990) 218 Cal.App.3d 221, 226.) Rather they "merely elaborate[d] or add[ed] further detail to a claim which was predicated on the same fundamental facts set forth in the complaint." (*Ibid.*)

Because the theory was sufficiently alleged in her complaint, it was unnecessary for plaintiff to seek leave to amend before the hearing on the summary judgment motion, as defendant argues. (*Laabs, supra*, 163 Cal.App.4th at p. 1253.) We also disagree with the court's finding and defendant's assertion that the theory was not specifically pleaded as required for claims against public entities. The complaint did not rely on generalized allegations (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5) but rather specified in what manner the condition constituted a danger (*People ex rel. Dept. of Transportation v. Superior Court* (1992) 5 Cal.App.4th 1480, 1485-1486), i.e., that the hard floor was, among other things, negligently designed in a way that allowed a dangerous condition to remain and that this caused plaintiff's injuries. By doing so, it satisfied the requirement that the complaint allege all the elements for statutory liability under section 835. (*Zipperer v. County of Santa Clara, supra*, 133 Cal.App.4th at p. 1020.)

Having found design defect was adequately raised by the pleadings, our next step is to determine whether defendant satisfied its initial burden on summary judgment to establish facts negating the claim and justifying judgment in its favor. (*Dawson v. Toledano, supra*, 109 Cal.App.4th at p. 392.) It did not. Defendant's moving

papers never addressed the issue and its reply brief contended the issue was improperly raised for the first time in opposition to the summary judgment motion and that in any event it was entitled to design immunity under section 830.6.

Given defendant's failure to establish the design defect claim was meritless, we necessarily conclude that the burden never shifted to plaintiff to produce evidence establishing a triable issue of material fact. (See *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.) As a result, we do not reach defendant's contention the issue was waived because plaintiff does not challenge the trial court's order sustaining various objections, other than irrelevance, to Avrit's declaration.

As to design immunity, assuming without deciding it could properly be asserted for the first time in the summary judgment reply brief, defendant nevertheless failed to make the requisite showing. To establish design immunity under section 830.6, defendant had the burden of establishing three elements: "(1) a causal relationship between the . . . design and the accident; (2) discretionary approval of the . . . design prior to construction; and (3) substantial evidence supporting the reasonableness of the . . . design. [Citations.]" (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69.) The only evidence defendant presented to support the second element was its own responses to special interrogatories. But as plaintiff points out, "a party may not rely on its own discovery responses in its own favor on summary judgment." (See *Great American Ins. Companies v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 450.) Defendant's design immunity theory, as a basis for summary judgment, flounders on this basis alone without regard to the remaining two elements.

In light of our conclusion, we need not address plaintiff's contentions that defendant's employees either created or had notice of the "wet foreign substance" on the floor, which she asserts was a dangerous condition of public property. Because triable issues remain with regard to the design defect theory, the judgment is reversed.

DISPOSITION'

The judgment is reversed. Plaintiff shall recover her costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.